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No. 90-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JUDITH A. BROWN AND AMERICAN LIFE LEAGUE, INC.,
Petitioners,

v.

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S SUBURBAN CLINIC AND
NORTHEAST WOMEN'S CENTER,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

CORRECTIONS TO RESPONDENTS' [RE]STATEMENT

Respondents inaccurately and misleadingly restate the case.

1. *The original lawsuit.* (a) All proceedings prior to August 24, 1988 were ex parte to Petitioners, who were not served until August 24. (b) Petitioners took no part in any demonstration. The demonstrations about which Respondents complain occurred during the week of July 4. (c) There is no evidence of

Petitioners' involvement in any way in planning, organizing, financing or participating in, a demonstration. (d) Petitioners never were contempt respondents. (e) Petitioners were not "listed as co-sponsors of Operation Rescue's activities in Operation Rescue literature . . ." Rather, Petitioner American Life League, Inc. was listed on one flier as a nominal cosponsor of a New York Operation Rescue, April 30-May 7, 1988—not Philadelphia, not July. (f) No act or event mentioned in §1, either full paragraph, on page 2 of the Brief in Opposition (other than the FRCivP41(a)(2) dismissal) relates to Petitioners. (g) The April 18, 1989 final judgment, to which Respondents refer, is a judgment against other Defendants, not against Petitioners, and does not involve Petitioners.

2. *The FRCivP 11 proceedings.* (a) The District Court's comment, quoted as applicable to "[petitioners'] counsel", in fact, is misquoted and had nothing to do with Petitioners' Counsel. Pet App 10a.[1] (b) The District Court did not "address the Rule 11 motion on its merits." Opposition, at 3. Rather, the District Court lumped together four separate FRCivP 11 motions and, in conclusory fashion, rejected them all. Pet App 7a-10a.

Further, the conduct in the District Court is not an issue before this Court.

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[1] Respondents' fn 2, page 3, is demeaning, irrelevant and inaccurate. Pet App 11a. Respondents complained to the District Court about a telephone conversation. The District Court, without waiting for Petitioners' response, accepted Respondents' accusations and referred the matter to the District of Columbia Bar, which investigated and on January 5, 1990 closed the file, finding no disciplinary violation.

ARGUMENT

I. THE DECISION BELOW DEPRIVES THE DISTRICT COURT OF JURISDICTION OVER POST-JUDGMENT FRCIVP 11 MOTIONS.

In *Mary Ann Pensiero, Inc. v. Lingle,* 847 F 2d 90 (1988), the Court of Appeals, while holding that the District Court had jurisdiction to adjudicate the post-judgment motion therein, deprived future district courts of that authority. The Court below applies *Pensiero.* Hence, the Court below denies such authority. Thus, jurisdiction effectively is denied.

In *Pensiero,* the Third Circuit in a previous appeal already had affirmed the District Court's grant of summary judgment. After receipt of the affirmance but before mandate, Defendants moved for FRCivP 11 attorneys fees. Because those Defendants could have raised the sanctions question in the earlier appeal on the merits, it is not surprising that the *Pensiero* panel announced the supervisory rule. *Pensiero* illustrates perfectly the fragmented appeals that the Court wanted stopped. No such appeal is at issue in this case. Nor was it possible procedurally for Petitioners at bar to file fragmented appeals.

The objective of the *Pensiero* rule is to end fragmented appeals. A defendant which benefits from voluntary dismissal with prejudice cannot appeal. Hence, the concern expressed in *Pensiero* does not exist with respect to any such dismissal. Petitioners could not have appealed the dismissal herein. As Professor Moore points out:

> . . . Where the trial court permits the plaintiff to dismiss with prejudice and thereby gives the defendant the basic relief to which he is

> entitled the judgment is not appealable by the defendant . . .
>
> 5 J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice*, ¶41.05 [3] (2d ed 1985).

Under the definition in FRCivP 54(a) of a judgment as "a decree or any order from which an appeal lies", there was no final judgment involving Petitioners in the District Court. In consequence, when Petitioners filed after dismissal they did not violate the *Pensiero* supervisory rule.

That the Third Circuit could not have intended its rule to include parties such as Petitioners is clear from *Schering Corporation v. Vitarine Pharmaceuticals, Inc.*, 889 F 2d 490 (3d Cir 1989). In *Schering*, Plaintiffs filed an FRCivP 41(a)(1) notice of dismissal and Defendants moved for an FRCivP 11 order after they were out of the case by virtue of the voluntary dismissal. Respondents claim that *Schering* presents a different situation than that of Petitioners because no final judgment is entered when a plaintiff voluntarily dismisses under FRCivP 41(a)(1)(i).

Neither is a final judgment entered when a party leaves a suit by court order issued under FRCivP 41(a)(2) as happened here. By its own terms, the supervisory rule is inapplicable for it requires that FRCivP 11 motions be filed before the entry of final judgment. Respondents' argument to distinguish the parties in *Schering* from Petitioners underlines the validity of Petitioners' point: two panels of the Third Circuit inconsistently treat parties in the same procedural situation. Had Petitioners been the sole Defendants at bar, no final judgment as to any party would have been issued. If the Third Circuit had fol-

lowed *Schering*, Petitioners would not have been deprived of their appeal of the sanctions denial; just as they would not have been so deprived had the panel at bar followed *Schering*.

Cooter & Gell v. Hartmarx Corp., 110 S Ct 2447 (1990), plainly does not speak to jurisdiction over an FRCivP 11 motion filed after a district court final judgment. The decision below does. Thus, this Court has the opportunity to close the two-pronged gap: (1) to extend the *Cooter & Gell* holding to include a FRCivP 41(a)(2) dismissal as well as a FRCivP 41(a)(1)(i) dismissal; and (2) to hold that such dismissal does not deprive a district court of jurisdiction when an FRCivP 11 motion is filed after, not before, judgment.[2]

II. THE *PENSIERO* RULE DID NOT PREVENT FRAGMENTED APPEALS. IT PREVENTED A MERITS REVIEW.

The *Pensiero* rule is unmerited as applied. Petitioners timely appealed their FRCivP 11 denial; other Defendants appealed other issues. The Court of Appeals consolidated not because of common or related issues but because the appeals arose from the same case and were approximately contemporaneous. The Court issued a separate opinion with respect to Petitioners' appeal, implicitly recognizing Petitioners'

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[2] The top paragraph, Opposition, at 6, is inaccurate and irrelevant. (1) Petitioners did not voluntarily dismiss; Respondents did. (2) The measure of elapsed time between dismissal and judgment is meaningless. The issue is disparate treatment of post-judgment FRCivP 11 motions, not of prejudgment motions. (3) Further, the judgment at bar relates to other Defendants, not to Petitioners.

appeal was unrelated to the other appeals.[3] The *Pensiero* rule did not prevent a multiplicity of appeals; it prevented a merits review of denial of sanctions to Petitioners.[4] This Petition does not challenge circuit supervisory rules per se. It challenges a rule which, as sweepingly applied, deprives Petitioners of a merits appeal other circuits allow and which, if an appellant draws a *Schering*-minded panel, the Third Circuit also allows.

The case at bar and *Schering*, of course, are inconsistent, because in each there was no final judgment as to the parties appealing an FRCivP 11 ruling, yet Petitioners were denied a merits appeal while the *Schering* appellants were granted one. The District Court and the Court of Appeals herein both applied the *Pensiero* prohibition at bar; they obviously thought *Pensiero* applies when there is a final judgment even though the final judgment does not relate to Petitioners, who already were dismissed. Thus, *Pensiero* and *Schering* are inconsistent.

Respondents' further dwelling upon the District Court proceedings[5] is irrelevant. The District Court's conduct is not before this Court.

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[3] Contrary to Respondents' assertion, Opposition, at 9, neither that opinion nor the denial of rehearing in banc cites *Schering* or recognizes the inconsistency between the two opinions. Pet App 1a, 14a.

[4] There could not be more than one appeal by Petitioners: they had nothing but sanctions denial to appeal. In *Pensiero*, the FRCivP 11 appeal was not filed until the prior appeal was adjudicated. At bar, there was not—and could not be—fragmented appeals by Petitioners.

[5] Fn 13, Opposition, at 13, again misstates the facts. (1)

Respectfully submitted,

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Respondents relied upon a flier pertaining to another event, in another city, at another time. There was no inquiry. (2) The District Court cast no aspersion on Petitioners' use of FRCivP 11. Respondents alter the District Court's language to make it appear otherwise.